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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 227

RICHARD REID ROGERS, *Petitioner,*

against

GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, VINCENT RIGGIO, J. B. HARVIE, R. J. BOYLAN, and THE AMERICAN TOBACCO COMPANY, *Respondents,*

and

C. F. NEILEY, A. C. MOWER, J. K. FLETCHER, CHARLES A. PENN (Deceased), and C. S. KEENE (Deceased), *Defendants.*

RICHARD REID ROGERS, *Petitioner,*

against

THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, *Respondents.*

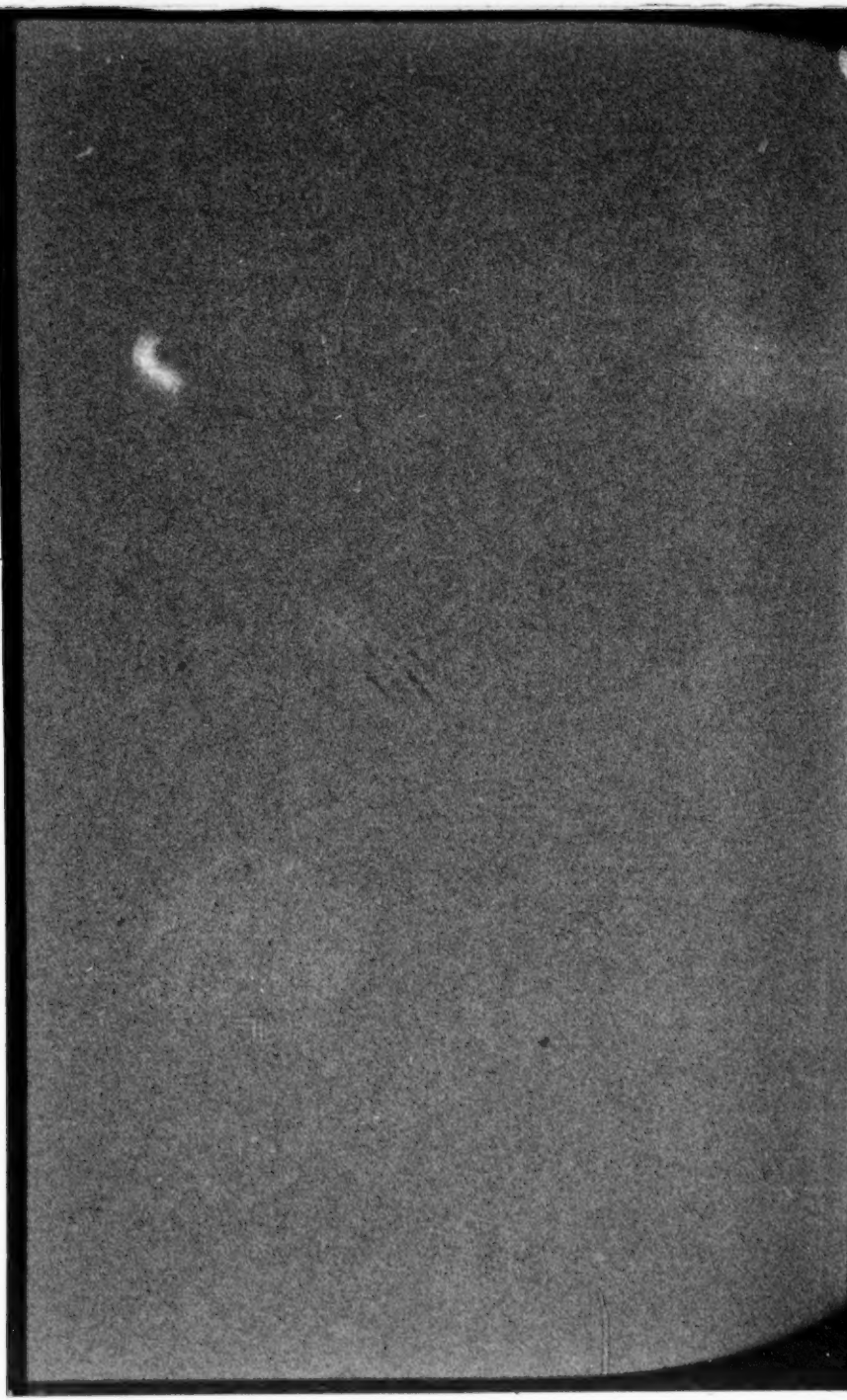
Consolidated Cause.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN W. DAVIS

CHADBOURNE, STANCHFIELD & LEVY,
WILLIAM M. PARKE,
DAVIS, POLK, WARDWELL, GARDINER & REED,
of Counsel.

CORPORATE PRESS, INC., New York City



SUBJECT INDEX

PAGE

PRELIMINARY STATEMENT 1

INTRODUCTORY STATEMENT 3

ARGUMENT 5

I. The first question is whether the proposition submitted to stockholders was a plan within the statute of New Jersey (L. 1920, Ch. 175) .. 5

II. The second question is whether it is a waste of corporate assets to allow employes, who subscribe for stock under an Employees' Stock Subscription Plan adopted by stockholders under a statute authorizing it, to pay therefor in cash to the par amount thereof and in services for any excess in value above par, directors who are also employes being allowed to participate 6

III. The third question is whether a stock subscription plan authorized by statute and adopted by a vote of 80 per cent. of all stockholders, and almost a unanimous vote of those present and voting at a meeting duly called for the purpose, is an unconstitutional invasion of the preemptive right of stockholders 7

IV. The fourth question is whether the Charter provision of a New Jersey corporation, empowering directors to set aside reserves and apply them in the purchase of property, limits the directors to the use of corporate funds either (1) to acquire property or (2) to pay dividends 8

V. The fifth question is whether Equity Rule 27 is applicable 8

VI. The sixth question is whether the statute authorizes subscriptions for stock to be paid in cash to the par amount thereof and by services to be rendered for any excess in value above par 9

PAGE

VII. In his number 7 petitioner refers to earlier plans. We are unable to perceive what question even the petitioner thinks is presented under his number 7, that ought to be reviewed by this Court 10

VIII. The eighth question is whether the participation of employe directors under the Plan voids the Plan, notwithstanding approval by the stockholders, with notice that directors would be permitted to participate. This is involved in petitioner's reason No. 2, and what was said in answer thereto applies equally here 11

IX. The refusal of Judge Patterson to assert jurisdiction is no longer in the case, since at the petitioner's request the Circuit Court of Appeals assumed jurisdiction and decided the case on the merits 11

CONCLUSION 12

APPENDIX A—The Plan 13

APPENDIX B—General Corporation Act, §§ 158-158c of New Jersey (L. 1920, Ch. 175, §§ 1-4) (Statute Under Which the Plan Was Authorized) 16

APPENDIX C—Opinion of PATTERSON, *D. J.*, Upon Settlement of Order 20

APPENDIX D—Order Entered on Mandate 21

Table of Cases Cited

	PAGE
Barrett v. Bloomfield Savings Institute, 64 N. J. Eq. 425	11
Bennett v. Millville Improvement Co., 67 N. J. L. 320	8
Bingham v. Savings Investment & Trust Co., 102 N. J. Eq. 302	7
Booth v. Beattie, 95 N. J. Eq. 776, aff'd. 95 N. J. Eq. 776	8
Church v. Harnit, 35 Fed. (2d) 499; cert. denied 281 U. S. 732	4
Harker v. Ralston Purina Co., 45 Fed. (2d) 929; cert. denied 284 U. S. 619	4
Hodge v. United States Steel Corp., 64 N. J. Eq. 807	7
Scott v. P. Lorillard Co., 108 N. J. Eq. 153; affd. 109 N. J. Eq. 417	8
Stone v. Holly Hill Fruit Products, 56 F. (2d) 553	9
United Copper Co. v. Amalgamated Copper Co., 244 U. S. 261	9
Vineland Grape Juice Co. v. Chandler, 80 N. J. Eq. 437, 440	10
Wallace v. Motor Products Corp., 25 Fed. (2d) 655; cert. denied, 279 U. S. 859	4
Wathen v. Jackson Oil Co., 235 U. S. 635	9

Table of Statutes Cited

NEW JERSEY

General Corporation Act, § 1 (L. 1896, Ch. 185, § 1)	3
General Corporation Act, §12 (L. 1896, Ch. 185, § 12, as am'd; L. 1926, Ch. 318, § 4)	4
General Corporation Act, §46 (L. 1896, Ch. 185, § 46)	4, 9
General Corporation Act, § 47 (L. 1896, Ch. 185 § 47, as am'd; L. 1901, Ch. 110, §2, as am'd; L. 1926, Ch. 318, § 14)	4
General Corporation Act, § 121 (L. 1920, Ch. 168, § 1, as am'd; L. 1921, Ch. 284, § 1, am'd; L. 1926, Ch. 318, § 15, supplementing L. 1896, Ch. 185, am'd; L. 1930, Ch. 120)	4
General Corporation Act, §124 (L. 1926, Ch. 318, § 16)	4, 7

PAGE

General Corporation Act, § 151 (L. 1917, Ch. 195, § 1) 4, 10
General Corporation Act, §158 (L. 1920, Ch. 175, § 1) 3, 6, 10
General Corporation Act, §158a (L. 1920, Ch. 175, § 2) 3
General Corporation Act, § 158b (L. 1920, Ch. 175, § 3) 9
General Corporation Act, §§ 158-158c (L. 1920, Ch. 175, §§ 1-4) 3, 4, 5, 6, 7, 8, 9, 10, 12

SUPREME COURT REVISED RULES

Rule 38 (275 U. S. 579, 622, as am'd 286 U. S., p. , 52 Sup. Ct. XV) 4

FEDERAL EQUITY RULES OF PRACTICE

Rule 27 (226 U. S. 656) 8, 9

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against

THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

Preliminary Statement.

These suits in equity originated in the New York Supreme Court, in which petitioner, a holder of record of 200 shares of Common Stock and 400 shares of Common Stock B of The American Tobacco Company, a New Jersey

corporation (hereinafter called the "Company") (R., pp. 12, 181), sought to enjoin the execution of an Employees' Stock Subscription Plan (hereinafter called "Plan") (R., pp. 35-36, 40-42). This Plan was duly authorized by 80% of the Company's outstanding stock and more than 99.99% of that present in person or by proxy, at a special meeting held, after due notification, for such purpose on July 28, 1930 (R., pp. 198-199, 253-256). Petitioner sought also to obtain cancellation of the stock, issued pursuant to the Plan, and nullification of the agreements under which shares of the Company's stock had been allotted to 535 different employes of the Company, including directors and officers who were active employes (R., pp. 35-36, 131-153).

The actions were duly removed to the Federal Court (R., p. 2) and thereafter petitioner served amended complaints (R., p. 3). The actions were then consolidated (R., p. 3) and answers were interposed by the appearing defendants (R., p. 3).

After joinder of issue petitioner made his motion to strike out the defenses, for judgment *pro confesso,* or, in the alternative, for an injunction *pendente lite* (R., p. 3).

The District Court denied that motion and in the exercise of its discretion, dismissed the bills of complaint without prejudice to petitioner instituting action in New Jersey (R., pp. 273-279).

Petitioner appealed to the Circuit Court of Appeals where he sought final disposition of the case* (Applts. Br., p. 28). Thereupon the latter tribunal asserted jurisdiction and held under the applicable New Jersey statutes that the complaints were properly dismissed (R., pp. 287-302). This was recognized by the District Court upon the settlement of the order in that court pursuant to the mandate of the Circuit Court of Appeals (Appendices C and D, pp. 20-22, *infra*).

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* The above statement is based upon the following from plaintiff's brief in the Circuit Court; "* * * the plaintiff would welcome a decision in this Court upon the merits * * * If in the Court's opinion the complaint does not state a cause of action, the judgment will have to be affirmed even though the grounds assigned were wrong."

The Plan was submitted to and authorized by the stockholders in compliance with §§ 1 and 2 of Chap. 175 of the Laws of 1920 of the State of New Jersey (R., pp. 185, 198-199, 249; see Appendix B for the text of this statute). Thereafter and about the 1st of February, 1931, 535 employes, including directors who were active employes, were accorded by the Board of Directors the right to subscribe under the Plan to a number of shares at $25 par value per share, upon the terms and conditions described in an agreement (Exhibit G, R., pp. 91-130) between the Company, the respective employes, and Guaranty Trust Company of New York and Junius Parker—the latter two named as Trustees in the Agreement.

In early March, 1931, the Company mailed to each stockholder of record, accompanying the annual report and notice of the annual meeting of the Company, to be held on April 1, 1931, a pamphlet setting forth what had been done by the Company in carrying out the Plan, with a copy of the subscription agreement with employes and the trust agreement above mentioned, and stating the exact number of shares allotted to the President, the number allotted to the five Vice-Presidents, and the number allotted to each of the other 529 employes (R., pp. 201, 91-130). At about the same time the petitioner inserted advertisements in the newspapers seeking proxies and criticising the Plan (R., pp. 8-9, 202).

At that meeting on April 1, 1931, the stockholders, having been thus advised of such facts, re-elected the Board of Directors by the largest number of votes ever cast at any annual meeting in the Company's history (R., pp. 202-204) thus effectively approving the acts of the Directors.

Introductory Statement.

This cause involved the construction of a charter of a New Jersey corporation and of the following New Jersey statutes:

General Corporation Act, § 1 (P. L. 1896, Ch. 185, § 1) (*Powers of Corporation*).

General Corporation Act, §12 (L. 1896, Ch. 185, § 12) (*Powers of Directors*).

General Corporation Act, § 46 (L. 1896, Ch. 185, § 46) (*Three Stockholders can call meeting*).

General Corporation Act, § 47 (L. 1896, Ch. 185, § 47, as am'd.; L. 1901, Ch. 110, § 2, as am'd.; L. 1926, Ch. 318, § 14) (*Power of Directors respecting capital and dividends*).

General Corporation Act, § 121 (L. 1920, Ch. 168, § 1, as am'd.; L. 1921, Ch. 284, § 1, am'd.; L. 1926, Ch. 318, § 15, supplementing L. 1896, Ch. 185, am'd.; L. 1930, Ch. 120) (*Issuance and sale of shares*).

General Corporation Act, § 124 (L. 1926, Ch. 318, § 16) (*Rights of stockholders respecting new stock issued for cash*).

General Corporation Act, § 151 (L. 1917, Ch. 195, § 1) (*Issuance of stock for labor*).

General Corporation Act, §§ 158-158c (L. 1920, Ch. 175, §§ 1-4) (*Statute authorizing the Plan*).

The decisions of the New Jersey courts where those local statutes have been construed are in complete harmony with that of the Circuit Court of Appeals in the instant case; not one is adverse.

No Federal question is involved. The facts are peculiar to the instant case, which does not fall within any of the categories of Rule 38 of this Court. There is less reason for a review by this Court than there was in many of the stockholders' actions in which certiorari was denied by this Court. See *Harker* v. *Ralston Purina Co.*, 45 Fed. (2d) 929; certiorari denied, 284 U. S. 619; *Church* v. *Harnit*, 35 Fed. (2d) 499; certiorari denied, 281 U. S. 732; *Wallace* v. *Motor Products Corp.*, 25 Fed. (2d) 655; certiorari denied, 279 U. S. 859.

We shall confine this brief to an outline of the questions involved in the petitioner's so-called reasons, which will thus appear to be reasons for refusing, rather than for allowing, the writ.

I.

The first question is whether the proposition submitted to stockholders was a plan within the statute of New Jersey (L. 1920, Ch. 175).

The entire basis of Judge Swan's dissent was that the proposition submitted was merely a proposal, not a plan.

The petitioner says it was not a plan because discretion was conferred on the directors to select and rate the employes to to be allowed to participate.

The Plan will be found in the record at pages 40-42. For the convenience of the Court, we have annexed it hereto as Appendix A (pp. 13-15).

The New Jersey statute is printed as Appendix B hereto (pp. 16-19).

The majority of the Circuit Court of Appeals held that the Plan complied with the statute.

The statute is couched in the broadest terms and does not define or prescribe any requirements of a plan.

Its obvious purpose was to encourage and give legislative approval to the policy long since adopted by many corporations of giving special compensation to employes by selling them stock on favorable terms in order to secure the advantages of continuous service and increased loyalty.

It would be unreasonable to attribute to the Legislature an intention, not expressed in the terms of the statute, to require that a plan or proposal, to be in effect over a period of time and under changing business conditions, a specification of the details of the selection of employes to whom special compensation was to be awarded or of the terms under which the compensation would be paid and the plan administered.

No New Jersey case is cited, and none can be found, giving such a construction to the statute.

II.

The second question is whether it is a waste of corporate assets to allow employes, who subscribe for stock under an Employees' Stock Subscription Plan adopted by stockholders under a statute authorizing it, to pay therefor in cash to the par amount thereof and in services for any excess in value above par, directors who are also employes being allowed to participate.

The New Jersey statute (Appendix B, pp. 16-19) provided, not only for the issue of stock to employes, but also for "aiding any such employees in paying for such stock *by contributions, compensation for services, or otherwise.*"

The Plan adopted by stockholders authorized the allotment of stock for subscription, "by way of additional compensation for services to be rendered (Appendix A, p. 13) * * * at prices not less than the par value of the shares allotted" (*id.* p. 14) and provided inter alia "No employee or person actively engaged in the conduct of the business of the corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the plan by reason of his being a director of the corporation or of any of its subsidiaries or of holding any office therein" (*id.* p. 15).

The subscription agreement provided for delivery of stock only upon payment of the par value in full, and in no event before December 31, 1931 (R., p. 113), and for the right of the Trustees to cancel in case of discharge or resignation before that date (R., p. 116).

The cases relied on by the petitioner, dealing with the general question of directors' and trustees' disqualification to deal with themselves, have no application. No New Jersey case is cited, and there is none, holding that participation of directors in an employes' stock subscription plan, if authorized by stockholders, is unlawful or a waste of corporate assets.

It is the law of New Jersey that a contract made between directors and their corporation, authorized by stockholders after notice of the directors' interest, is unassailable save for actual fraud or want of power. (*Hodge* v. *U. S. Steel Corporation,* 64 N. J. Eq. 807, 813-814).

III.

The third question is whether a stock subscription plan authorized by statute and adopted by a vote of 80 per cent. of all stockholders, and almost a unanimous vote of those present and voting at a meeting duly called for the purpose, is an invasion of the preemptive right of stockholders.

If so, every State statute authorizing employes' stock subscription plans, or the issuance of stock for property or services is invalid.

The preemptive right of a stockholder of a New Jersey corporation has never been held to be of a contractual nature. In its inception it was but the result of a rule of equity to preserve the proportionate interest of the stockholders in the voting rights and property of the corporation, and consequently the rule has always been confined to a sale of stock solely for cash and never been applied to stock issued in whole or in part for either property or services.

The New Jersey Courts have expressly held that "the right of stockholders to participate in an increase in the capital stock of the corporation is purely statutory and subject to modification or repeal by the legislature." *Bingham* v. *Savings Investment & Trust Co.,* 102 N. J. Eq. 302, 306.

The New Jersey statute of 1926, cited by petitioner, conferred that statutory right upon a stockholder for the first time in New Jersey; but this later Act did not purport to repeal or modify in any way the provisions of the earlier Act of 1920 under which the Plan was authorized.

Scott v. *Lorrillard Co.*, 108 N. J. Eq. 153; aff'd, 109 N. J. Eq. 417, relied on by the petitioner, involved an issue of stock to a particular group of stockholders not made under the authority of the Act of 1920, not having any relation to services, but based entirely on the ownership of their shares.

IV.

The fourth question is whether the Charter provision of a New Jersey corporation, empowering directors to set aside reserves and apply them in the purchase of property, limits the directors to the use of corporate funds either (1) to acquire property or (2) to pay dividends.

The instant case involves the issue of stock, not the application of earnings, but, even assuming the latter to be involved, the New Jersey cases, as well as common sense, are against the petitioner.

The allotment of stock under the Plan was in part payment for services—as a part of the expenses of the business. There could be no profits until the expenses were paid. *Bennett* v. *Millville Improvement Co.*, 67 N. J. L. 320; *Booth* v. *Beattie*, 95 N. J. Eq. 776; affd. 95 N. J. Eq. 776.

V.

The fifth question is whether Equity Rule 27 is applicable.

One of the grounds for dismissal stated in the majority opinion of the Circuit Court of Appeals was that petitioner had failed to comply with Federal Equity Rule 27. It is clear from the opinion that this was an alternative ruling and that since the Plan was wholly valid, under New Jersey law, the decision of the case would have been the same, even if there had been compliance with Rule 27.

Petitioner relies upon the dissenting opinion in the Circuit Court of Appeals. But, the only justification advanced in that opinion for petitioner's failure to appeal to the stock-

holders before bringing suit was that such action was unnecessary because in the view of the dissenting judge the issue of stock was *ultra vires* and void for failure to comply with the statute.

The majority opinion in the court below holds that the stock was validly issued.

It is clear that the instant controversy presented a clear case for the application of the Rule.

The petitioner does not claim that he has attempted to secure action of the stockholders or that the directors constitute or control a majority of stockholders or anything like a majority. *United Copper Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261; *Wathen* v. *Jackson Oil Co.*, 235 U. S. 635; *Stone* v. *Holly Hill Fruit Products*, 56 Fed. (2d) 553.

Such recourse was available to petitioner.

The statute (Appendix B, p. 19) provides: "Any plan adopted * * * may be recalled, abolished, revised, amended, altered or changed in the same manner as is herein provided for its adoption."

The Plan itself provided for its recall, abolition, revision, amendment, alteration or change by the stockholders (Appendix A, p. 15).

Section 46, Chap. 185 of the Laws of 1896 of New Jersey, provides that three stockholders having voting power may call a stockholders' meeting and such meeting is a legal meeting for all purposes.

VI.

The sixth question is whether the statute authorizes subscriptions for stock to be paid for in cash to the par amount thereof and by services to be rendered for any excess in value above par.

Again the petitioner cites no New Jersey case which he claims is opposed to the ruling of the majority of the Circuit Court of Appeals. There is none.

The Company received par $25 per share from the Guaranty Trust Company, the trustee under the agreement, for each share of stock issued under the Plan.

We have shown under II that the subscription agreement provides for cancellation in case of dicharge or resignation before the date fixed for issue of the stock. The agreement then is a contract for the payment for services in part in stock, to be cancelled if the services are not rendered. *Vineland Grape Juice Co.* v. *Chandler,* 80 N. J. Eq. 437.

The statute under which the Plan was authorized permits the stock to be issued without payment in full at the time of issue: "The issue * * *, and the payment for such stock in instalments or at one time, with or without the right to vote thereon, pending payment therefor in full * * *."

We have also shown under II that the statute authorizes aid to employes by *"contributions, compensation for services, or otherwise."*

The petitioner cites § 151* of the General Corporation Laws of New Jersey authorizing stock to be issued "for labor performed."

That would be ample authority for the issue complained of, but in truth that issue was made under the Act of 1920 (Appendix B), not under said § 151.

VII.

In his number 7 petitioner refers to earlier plans. We are unable to perceive what question even the petitioner thinks is presented, that ought to be reviewed by this Court.

Apparently petitioner wants the Court to know that there were earlier plans, which are the subject of other pending actions, but as to which no relief is asked in this suit.

* Petitioner, actually cites § 46 but that is obviously an error as that section deals with the right of three stockholders to call a meeting.

VIII.

The eighth question is whether the participation of employe directors under the Plan voids the Plan, notwithstanding approval by the stockholders, with notice that directors would be permitted to participate. This is involved in petitioner's reason No. 2, and what was said in answer thereto applies equally here.

On June 25, 1930, when the Board voted that it deemed it advisable to submit the Plan to the stockholders, no director could know that two-thirds of the stockholders would approve the Plan. No director voting for the resolution was dealing with himself.

We have referred in II to the provisions of the notice that "no employee or person * * * shall be deemed ineligible to the benefits of the plan by reason of his being also a director of the corporation * * * or holding any office therein" (R., p. 49).

In the case of *Barrett* v. *Bloomfield Savings Institute,* 64 N. J. Eq. 425, cited by petitioner, the question of independent majority stockholders authorizing the action of directors to treat with themselves, was not present nor do any of the other authorities cited by petitioner under this Point apply to the case at bar.

IX.

The refusal of Judge Patterson to assert jurisdiction is no longer in the case, since at the petitioner's request the Circuit Court of Appeals assumed jurisdiction and decided the case on the merits.

Petitioner urges as an additional ground for certiorari the refusal of the District Court to take jurisdiction in the first instance (Pet., pp. 30-32). It is clear from both the majority opinion (R., pp. 287-297) and the dissenting opinion (R., pp. 297-302) that the Circuit Court of Appeals assumed jurisdiction of the cause and decided the issues on the merits. (Apndx. C and D, pp. 20-22, *infra.*) Consequently, even if it were proper for petitioner now to complain that the Circuit Court—in the hearing *de novo* accorded in such equity

cases—assumed the very jurisdiction he requested it to take, this Court would concern itself solely with the question whether the dismissal of the complaints was proper under the applicable New Jersey law.

Whether the District Court should have taken jurisdiction was a matter of discretion. But whether that discretion was properly exercised (which is immaterial and of no importance on the present application) there can be no doubt that these actions involve only questions of local New Jersey law.

The crux of the cause is to nullify a Plan authorized under a New Jersey statute (L., N. J., 1920, Chap. 175) and to cancel stock issued thereunder. The Charter of a New Jersey corporation and the series of New Jersey statutes referred to (pp. 3-4, *supra*), the complex provisions of which are interrelated and which are, of course, applicable only to New Jersey corporations, are involved. The controversy is clearly a local one which presents no Federal question.

Conclusion.

The present cause presents no issue as to which this Court should exercise its discretionary power of review. These actions represent merely an attempt to interfere with the internal management of a New Jersey corporation engaged in a nation-wide business, the corporate affairs of which were subject to and governed by the local statutes. The facts are wholly individual and unique. No question of federal jurisdiction or of general law is presented, nor is there any conflict of decisions to be resolved. Review of the final decision in the present case is no more warranted than would be the review of any one of many stockholders' suits constantly being brought.

The petition should be denied.

Respectfully submitted,

JOHN W. DAVIS

CHADBOURNE, STANCHFIELD & LEVY,
WILLIAM M. PARKE,
DAVIS, POLK, WARDWELL, GARDINER & REED,
of Counsel.

APPENDIX A

Employees' Stock Subscription Plan.

I. Purpose.

The purpose of this Plan is to accord to such employees of The American Tobacco Company (herein called the "Corporation") and its subsidiaries, and to those actively engaged in the conduct of its or their business, as may be selected as herein provided, by way of additional compensation for services to be rendered, an opportunity to purchase shares of the stock of the Corporation.

II. The Plan.

The Plan is to allot for subscription, in the manner and upon the conditions herein provided, by way of additional compensation for services to be rendered, shares of the unissued Common Stock B of the Corporation which may be authorized by amendment to the Certificate of Incorporation of the Corporation voted at the same meeting of stockholders at which this Plan may be approved, to such of the employees of the Corporation and/or its subsidiaries and those actively engaged in the conduct of its or their business as may be selected as hereinafter set forth; provided, however, that there shall at no time be any issuance of shares under this Plan, when the effect of such issuance would be to increase the total number of shares of Common Stock and Common Stock B issued and outstanding above an aggregate of five million shares.

III. Execution of the Plan.

The Board of Directors may, at such time or times as it may determine, by way of additional compensation for services to be rendered, offer and allot such stock for subscription, to employees of the Corporation, and/or its subsidiaries,

and to those actively engaged in the conduct of its or their business, in such amounts and proportions, to such persons, at such prices not less than the par value of the shares allotted, payable in full or in such installments, and upon such other terms and conditions, all as shall be determined with respect to each offering of stock to each individual pursuant to authority to be granted by the Board of Directors to the President for such purpose.

IV. Rights of Subscriber Prior to Payment.

No stock shall be delivered until such stock has been fully paid for. The Board of Directors, however, may provide that subsequent to subscription for said stock and prior to the time the full subscription price has been paid, the subscribers shall possess such voting (if any) and other rights pertaining thereto, including the right to receive dividends thereon and to subscribe to any new issue of stock by the Corporation, that may be permitted to other holders of Common Stock B of the Corporation. Any and all payments accruing to any such subscriber, by way of dividend or otherwise, prior to the full payment for his stock shall be credited to the subscriber on account of the payments agreed to be made by him in the purchase of said stock, and shall not be paid directly to such subscriber until full payment for his stock has been made.

V. General Conditions.

The Board of Directors may attach to each offering of stock such detailed conditions governing the cancellation and withdrawal of subscriptions and refund of payments and the handling of the same in case of death, disability or pensioning of employees, temporary suspension of employment, permanent discharge or leaving service, or providing for other special situations, in such manner as it shall deem reasonable and appropriate and best calculated to effectuate

the purposes of this Plan; provided that in no event shall any amounts paid in be forfeited; and in case of cancellation or withdrawal, all such amounts shall be returned with interest at such rate, not to exceed Six Per Cent. (6%) per annum, as the board of Directors may determine. No employee or person actively engaged in the conduct of the business of the Corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the Plan by reason of his being also a director of the Corporation or of any of its subsidiaries or of holding any office therein.

VI. Recall or Amendment.

This Plan may be recalled, abolished, revised, amended, altered or changed, as provided in Section 3 of Chapter 175 of the Laws of the State of New Jersey for the year 1920.

APPENDIX B

Statute Under Which the Plan Was Authorized.

158. Power of domestic corporation to provide for participation of employees in purchase of stock, profits, welfare work or management.

Any stock corporation formed under any law of this state may, upon such terms and conditions as may be determined in the manner hereinafter designated, provide and carry out a plan or plans for any or all of the following purposes:

(a) The issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf, and the payment for such stock in instalments or at one time with or without the right to vote thereon pending payment therefor in full, and for aiding any such employees and said other persons in paying for such stock by contributions, compensation for services, or otherwise.

(b) The participation by all or any of its employees and such other persons in the profits of the corporate enterprise or of any branch or division thereof. Such share in such profits shall be regarded as a part of the corporation's legitimate expenses.

(c) The furnishing to its employees wholly or in part at the expense of such corporation of medical services, insurance against accident, sickness or death, pensions during old age, disability or unemployment, education, housing, social services, recreation or other similar aids for their relief or general welfare.

(d) The nomination and election by its employees of one or more thereof as a member or members of its board of directors, such member or members to have the same rights and authority and be subject to the same duties and respon-

sibilities as the directors to be elected by the stockholders. Every such corporation may determine and provide the manner of making any such nominations and calling and conducting any such election, the time or times, the place or places where it shall be held, what number of years of service or other qualifications shall entitle its employees to one or more votes, whether said votes shall be cast personally or by proxy, what number of votes shall be required to elect, and such other restrictions and conditions as may be deemed expedient and proper; *provided, however,* that the voting at all such elections shall be by secret ballot, and that if less than a majority of employees entitled to vote participate in the election, such election shall be inoperative and void. Any vacancy occurring in any such office by reason of a failure to elect or otherwise, shall be filled in the manner provided for in the plan, and in the absence of such provision such vacancy shall be filled from among the employees or stockholders by the board of directors. (L. 1920, ch. 175, p. 354, § 1; S. 47-183.)

158a. Manner of exercising privileges and powers granted by preceding section.

Any of the privileges and powers hereinbefore granted may be exercised in the manner following:

(a) By including appropriate clauses therefor in the original articles of incorporation or by-laws at the time of organizing the corporation.

(b) Where the corporation has been formed without the said charter or by-law provisions the board of directors shall first formulate such plan or plans and pass a resolution declaring that in its opinion the adoption thereof is advisable, and shall call a meeting of the stockholders to take action thereon. The stockholders' meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision upon ten days' notice given personally or by

mail. If two-thirds in interest of each class of stockholders present at said meeting and voting shall vote in favor of any such plan or any modification thereof, the said plan shall thereupon become operative.

(c) In case any corporation shall hereafter adopt a plan providing for the issue of new stock under subdivision (a) of section 1 of this act, or any plan provided for in subdivision (d) of such section 1, any stockholder holding stock issued by such corporation before the enactment of this law, not voting in favor of such plan, may, within thirty days after the adoption thereof, file with the secretary of the company a dissent in writing therefrom. The person so dissenting shall within ten days after the filing of such dissent, and upon five days' notice to the corporation, apply by petition to the Circuit Court of the county in which the corporation has its principal office for the appointment of three disinterested appraisers to appraise the fair value of the stock held by such stockholder in said corporation and issued prior to the enactment of this law without regard to any depreciation or appreciation thereof in consequence of the adoption of such plan, whose award (or that of a majority of them) when confirmed by the said court, shall be final and conclusive on all parties, and said corporation shall pay to such stockholder the value of such stock as aforesaid. On receiving such payment, or on a tender thereof, or in case of any legal disability or absence from the state, on the payment of such award into said court, said stock shall be transferred to the said corporation, to be disposed of by the directors thereof or to be retained for the benefit of the remaining stockholders; and in case the said award is not paid within thirty days from the filing of said award and confirmation by said court and notice thereof to be given in the manner aforesaid unto such corporation, the amount of the award shall be a judgment against said corporation, and may be collected as other judgments in said court are by law collected. Such

court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The charges and expenses of the appraisers and appraisal as approved by the court shall be paid by the corporation; *provided, however,* that the corporation may at any time before the proceedings hereinbefore mentioned are instituted or completed elect to permit such dissenting stockholder to subscribe for his proportionate share of such new stock issued under section one, subdivision a, in which event the said proceedings shall not be instituted, or, if instituted, shall be terminated upon the payment of the appraisal expenses as aforesaid by the corporation. (L. 1920, ch. 175, p. 355, § 2; S. 47-184.)

158b. Change or abolishment of plan adopted; restoration of moneys to employees.

Any plan adopted as aforesaid may be recalled, abolished, revised, amended, altered or changed in the same manner as is herein provided for its adoption; subject, however, to the restoration by the corporation of any moneys contributed by the employees or those actively engaged in the conduct of the corporate business, and for which no stock or other equivalent has been issued. (L. 1920, ch. 175, p. 357, §3; S. 47-185.)

158c. Privileges and powers conferred by act in addition to other powers and authority.

The privileges and powers conferred by this act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of any of the powers now permitted to corporations of this state. (L. 1920, ch. 175, p. 357, §4; S. 47-186.)

APPENDIX C

Opinion of Patterson, D. J., Upon Settlement of Order.

RICHARD REID ROGERS, *Plaintiff,* against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, et al., *Defendants.*	Consolidated Cause. E—59-307.

MEMORANDUM.

PATTERSON, D. J. The opinion of the Circuit Court of Appeals must be consulted to ascertain what was intended by the mandate. The opinion shows that a majority of the court held that for several reasons there was no equity in the bill. In conformity with such decision, the decree now to be entered will be a dismissal of the bill with a provision for $25 costs, as specified in the mandate.

(Sgd.) ROBERT P. PATTERSON,
U. S. D. J.

July 8, 1932.

APPENDIX D

Order Entered on Mandate.

At a Stated Term of the United States District Court for the Southern District of New York, held at the Post Office Building, in the Borough of Manhattan, City of New York, on the 11th day of July, 1932.

Present—Hon. ROBERT P. PATTERSON, District Judge.

RICHARD REID ROGERS, *Plaintiff,* against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY, *Defendants.*	Consolidated Cause. E—59-307.
RICHARD REID ROGERS, *Plaintiff,* against THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, *Defendants.*	

A decree in the above-entitled consolidated cause having been entered in this Court on the 23rd day of February, 1932, in favor of the defendants Guaranty Trust Company of New York, Junius Parker, George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, T. R. Taylor, and The American

Tobacco Company, denying plaintiff's motion for an order to strike out the first, second, third, and fourth separate defenses of the answer therein, and for a decree in accordance with the prayer of the amended bill of complaint therein, or, in the alternative, for an order for an injunction *pendente lite,* the said decree having dismissed each of the bills of complaint therein without prejudice to the enforcement of the rights of plaintiff, if any, in the courts of New Jersey, and plaintiff having taken an appeal from the said decree to the United States Circuit Court of Appeals for the Second Circuit, from which a mandate has duly issued to this Court affirming said decree of this Court, and it appearing from the decision of the said Circuit Court of Appeals that the said cause was adjudicated by said Circuit Court of Appeals in favor of the said defendants on the merits, it is hereby

ORDERED, that the defendants Guaranty Trust Company of New York, Junius Parker, George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, T. R. Taylor and The American Tobacco Company have judgment against the plaintiff Richard Reid Rogers that each of the bills of complaint herein be and the same is hereby dismissed with $25 costs, which costs will be fixed by the Clerk against the said plaintiff, and for which, if not paid in ten days, execution will issue upon the application of any party in interest.

ROBERT P. PATTERSON,
U. S. D. J.